IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1127

ROBERT PAUL OBURN, PHILIP D. FAZENBAKER, HALL E. SOLOMON, JR., CLIFFORD P. ARTMAN, STANLEY KOMOSINSKY, MATTHEW CHABAL, individually and on behalf of all other persons similarly situated, and THE CONFERENCE OF STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE, *Petitioners,*

VS.

MILTON SHAPP, JAMES D. BARGER, ISRAEL PACKEL, RICHARD MADISON, EARNEST KLINE, RICHARD ROSENBERG, individually and in their official capacity; WILLIAM BOLDEN, III, AND ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE, *Respondents*

AND

DONALD LUTZ and MICHAEL WARFEL, *Petitioners,*

VS.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, EARNEST KLINE, and RICHARD ROSENBERRY, individually and in their official capacity, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM S. KIESER
KIESER AND GAHR
N.W. Market Square
Williamsport, Pa. 17701

Attorney for Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on November 17, 1976.

CITATIONS TO THE OPINIONS BELOW

The opinion of Judge Green, United States District Court for the Eastern District of Pennsylvania, dismissing Petitioners' complaints on February 19, 1976, appears in Appendix B, and is reported at 70 F.R.D. 549. The opinion of the United States Court of Appeals for the Third Circuit, modifying Judge Green's order but affirming the dismissal of the complaints, appears in Appendix C, and is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners, who are not members of a minority classification, may be discriminated against by giving preference to minorities on the sole basis of race and national origin in the hiring and promotion of the Pennsylvania State Police?

2. Whether a complaint that alleges that plaintiffs are identifiable white persons who were not hired for or promoted in jobs with the Pennsylvania State Police solely because of their race and national origin, while minorities who were never personally discriminated against were hired or promoted solely on account of their race and national origin, states a claim upon which relief can be granted under the Fourteenth Amendment to the United States Constitution and the laws of the United States, 42 U.S.C. § 1983?

3. Whether Petitioners who are white may maintain a separate action to challenge preferences given to minorities in hiring and promotion by the Pennsylvania State Police solely on the basis of race and national origin where such preferences are mandated by a consent decree entered in a proceeding in which Petitioners' interests were not adequately represented?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Fifth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. §§ 1331, 1343(3), 1343(4), 2281; and 42 U.S.C. §§ 1981, 1983, 2000e-2(j), the texts of which are printed as Appendix A. See also 71 Pa. Stat. Ann. § 251, set forth in Appendix D.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from the dismissal of complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in two companion cases (hereinafter called *Oburn* and *Lutz*). Petitioners in both cases alleged in their complaints that they were entitled to injunctive relief and monetary damages because of the hiring and promotion of a fixed quota of minorities (defined as non-white or Spanish-surnamed individuals). Petitioners alleged that the Pennsylvania State Police ("State Police") invidiously discriminated against them in violation of the equal protection clause of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Federal jurisdiction was alleged under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 1343(3), (4) (deprivation of federal rights by state action).

Petitioners were all identifiable persons, although they sought to have their case declared a class action. No minority individual who was hired or promoted

under the procedures of the State Police that were designed to hire and promote a fixed quota of minority persons on the basis of their race and national origin to the detriment of Petitioners was required to show that he himself had been a victim of racial discrimination by the State Police.

Petitioners were excluded from being hired or promoted solely because of their race and national origin. The Petitioners who are involved in the *Oburn* case are three "non-minority" applicants for the Pennsylvania State Police Academy (the "Academy") who were not considered for employment whereas minorities with lower scores in the initial qualifying examination were considered further for employment solely because they were minorities. The three other Petitioners who were involved in *Oburn* were state policemen who were the top individuals eligible for promotion within ranks of the State Police when the Commissioner of the State Police revoked the promotion lists and replaced it with a system providing for the promotion of a fixed quota of minorities and non-minorities. Petitioner Conference of State Police Lodges of the Fraternal Order of Police ("FOP") seeks to represent all individuals, whether or not state policemen, who are similarly situated to the interests of the individual Petitioners. Respondents are the Governor of the State, the Commissioner of the State Police, the State Attorney General and other officials involved in the hiring and promotion of state policemen. In addition, William Bolden, III, the named plaintiff in a previous litigation, *Bolden et al.* v. *Pennsylvania State Police, et al.*, Civil Action No. 73-2604, which resulted in the consent decree pursuant to which racial quotas in the hiring and promotion of

State Police were established, and all minority applicants to and employees of the State Police, were Intervenors-Defendants in the action.

Petitioners in the *Lutz* case are two "non-minority" individuals who received scores which ranked them among the top 153 persons taking an initial qualifying examination for appointment to an Academy class which had 153 places. Despite their ranking, they were not granted admission to the Academy, and 40 minorities who ranked below them were admitted. Respondents are the same as in the *Oburn* case.

Hiring Procedures

On September 4, 1974, a written examination was given to applicants for the State Police. Petitioners in the *Oburn* case received scores as follows: Oburn 91, Fazenbaker 84 and Solomon 87. They were classified as "non-minorities." Because they were non-minorities and because their scores were below 92 on the initial written examination, the three Petitioners were summarily eliminated from further consideration for admission to the Academy by Respondents. As a result they were not considered further for employment and were not hired by the State Police. On the other hand, minorities who received scores below 92 on the initial written examination were processed further, provided only that they had a score of 65 or better. The State Police hired 48 minorities who had written scores of between 65 and 92. It is apparent that the employment of minorities having scores below 92 and the elimination of the "non-minorities," including the Petitioners, who had scores below 92 were based solely on race and national origin. This racial classification disadvantaged and harmed the Petitioners by denying

them: (1) the opportunity to improve their position in the overall final rating by further testing, (2) the opportunity to be considered further for employment. Both these opportunities were accorded to minority applicants similarly situated.

Admission to the Academy was to be based on a "final earned rating" derived from a weighted average of the initial written qualifying examination and further processing, including an oral examination. Two separate pools of candidates were established for further processing: non-minorities and minorities. For every two non-minorities selected for admission to the Academy from their pool, one minority from the other pool had to be selected. Membership in the class was to be awarded to the applicants in the order of the final earned ratings subject to the foregoing 2 to 1 ratio. Petitioners involved in *Lutz* scored higher than the arbitrary 92 cutoff point for non-minorities on the initial written qualifying examination and were further processed and received earned ratings that placed Petitioner Lutz 139th on the admissions list and Petitioner Warfel 122nd. Neither Petitioner was admitted to the Academy, however, solely because of their race, *i.e.*, they were displaced by minorities under the 2 to 1 ratio quota. The Respondents determined that since the size of the Academy class was to be 153, to implement the 2 to 1 ratio, minority membership of the class had to consist of 51 minority applicants. The final earned ratings of all of the minority applicants were such that only eleven were within the top 153 on the admissions list. In order to achieve the quota of 51 minority applicants, forty persons from the minority pool with lower ratings on the list than 153, and therefore lower than Lutz and Warfel, were admitted to

the class, thereby "bumping" Lutz, Warfel and 38 other non-minority persons who otherwise would have been accepted.

The State Police hiring quota of one minority to two non-minorities was established when the Respondents agreed to the imposition of such a quota in a consent decree filed in the United States District Court for the Eastern District of Pennsylvania in *Bolden* v. *Pennsylvania State Police,* Civil Action No. 73-2604. The consent decree was entered on June 20, 1974. This one minority to two non-minorities admissions ratio requirement is to continue, under the terms of the consent decree, until 9.2% of the enlisted State Police force consists of minorities. This racial quota is to continue in effect even after the written admissions examination is job-validated as defined in the consent decree. There are currently 60 minority members of the State Police, which has an authorized complement of 3,973 men. To achieve 9.2%, or 365 minority members, the 2:1 ratio would have to continue for an indeterminate period, depending upon vacancies occurring in the ranks of the State Police.

Promotions

Three of the *Oburn* Petitioners, Artman, Komosinsky and Chabal, are State Police who, prior to October 24, 1974, ranked first for promotion to corporal, sergeant and lieutenant, respectively. Their rank on the promotion lists was based on a weighted average consisting of a written examination, seniority points and efficiency ratings. All three Petitioners anticipated that they would be promoted shortly, since there were then openings in the ranks. However, on October 24, 1974 the Commissioner of the State Police promul-

gated Regulation No. 74-194 which rescinded the promotion lists, in order to implement a system of racial quotas for promotions mandated by the *Bolden* consent decree. Promotions were to be made on the basis of 1 minority promotion for every three non-minority promotions, so long as there were sufficient minorities in the promotion pool to meet the ratio.

The promotion pool, under the Regulation, is to be determined by a weighted average of a promotional test and efficiency rating. No credit is to be given for seniority. Promotions are to be made on the basis of the numerical ratings. However, if this does not result in 25% of all promotions being minorities, a minority individual in the top one-third of the pool will be promoted over a higher-ranking non-minority.

This quota system was adopted as part of the promotional regulations of the State Police by the Commissioner with the approval of the Governor, pursuant to the appropriate state statute, 71 Pa. Stat. Ann. § 251, which is set forth in Appendix D. Promotions are to be made in this manner according to the ratio until 9.2% of all personnel in the ranks of corporal, sergeant and lieutenant, respectively, of the State Police are minorities.

The Bolden Consent Decree

None of the Petitioners was a party to nor represented in the *Bolden* case, nor was that case declared a class action. After the filing of their original complaints in *Oburn* and *Lutz,* however, Petitioners became aware of irregularities which had occurred in the negotiation of the *Bolden* consent decree which emphasized Petitioners' right to litigate their claims independent of *Bolden.* Accordingly, Petitioners filed

amended complaints in *Oburn* and *Lutz,* asserting that the *Bolden* consent decree was obtained through (1) fraud on the court, (2) misrepresentations to the court, (3) unauthorized stipulations of counsel and (4) inadequate representation of the Petitioners' interests by the parties to the *Bolden* case.

The amended complaint alleges, with respect to fraud on the court, that the FOP (a Petitioner in the present action) attempted to intervene in *Bolden* and retained counsel to represent it for this purpose. Said counsel was subsequently hired by the Commonwealth of Pennsylvania to participate in *Bolden,* and he discontinued his representation of the FOP in that case, although still representing the FOP generally.

Although the FOP voted 9-6 to oppose the proposed consent decree in *Bolden,* this information was not presented to the *Bolden* court, despite the fact that the judge who entered the *Bolden* consent decree stated that it would not have been approved by the court without the FOP's approval. Instead, it was represented to the court, without the knowledge and consent of the FOP, that it had approved the entry of the consent decree. Throughout the negotiations which led to the consent decree, certain representations were made to the court allegedly on behalf of the FOP, but without its authorization and knowledge.

In addition, certain stipulations were made of record in the *Bolden* case which were made without the authority or consent of the principal Respondent, the Commissioner of the State Police. These unauthorized stipulations made an effective defense of the case difficult and led to entry of the consent decree. It is also alleged that whatever representation of the Petitioners' interests was accorded by the parties to the *Bolden* case was inadequate.

Procedure

The complaint in the *Oburn* case was filed on January 3, 1975, in the United States District Court for the Middle District of Pennsylvania, and the complaint in the *Lutz* case was filed in the same court on February 24, 1975. In the *Oburn* case a three-judge court was convened on February 18, 1975. This court sat on February 27, 1975, and immediately transferred the case to the Eastern District of Pennsylvania. The *Lutz* case was also transferred to the Eastern District of Pennsylvania on February 28, 1975.

On March 4, 1975, a hearing was held by the United States District Court for the Eastern District of Pennsylvania before Judge Clifford Scott Green, who had approved the consent decree in *Bolden* v. *Pa. State Police,* Civil Action No. 73-2604. Judge Green's denial of a preliminary injunction was affirmed on appeal. 393 F. Supp. 561 (E.D.Pa.), *aff'd* 521 F.2d 142 (3d Cir. 1975).

Thereafter, Petitioners in the two companion cases filed an amended complaint in the United States District Court for the Eastern District of Pennsylvania alleging fraud and misrepresentation. On February 19, 1976, the District Court dismissed Petitioners' complaints and amended complaint for lack of subject matter jurisdiction pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure because the Petitioners' claims were an "improper collateral attack" upon a final judgment.

On November 17, 1976, the Third Circuit modified the District Court Order striking out reference to lack of subject matter jurisdiction and dismissal under Rule 12 (b)(1) and in lieu thereof affirmed the dismissal of

Petitioners' complaints on the basis of Rule 12 (b)(6) holding that the complaints failed to state a claim upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

I. This Is A Matter Of First Impression In This Court That Affects All Of The Citizens Of The United States.

The complaints allege that the Petitioners have been disadvantaged solely on the basis of race. The dismissal of the complaints by the Court of Appeals for the Third Circuit on the ground that the complaints fail to state a claim upon which relief can be granted has effectively ruled that all parties who suffer harm as a result of quotas imposed as part of an affirmative action program—be it called "reverse discrimination" or "benign discrimination"—cannot seek relief for their injury. Although this Court has never ruled directly upon the issue, analogous opinions of this Court and similar holdings in the Second Circuit indicate that the Third Circuit's opinion was incorrect. This case also presents issues that are comparable to two other cases pending review in this Court, *Regents of the University of California* v. *Bakke,* No. 76-811 and to a lesser extent, *Milliken* v. *Bradley,* No. 76-447.

The ultimate issue presented by this Petition is the same issue presented to this Court in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). The three justices who joined in Mr. Justice Brennan's dissent correctly noted that the constitutional issues involved in a case that questions the imposition of a quota system

> ". . . concern vast numbers of people . . . as evidenced by the filing of twenty-six amicus curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not

> disappear. They must inevitably return to the federal courts and ultimately again to this Court." 416 U.S. at 350.

Those words in April, 1974 are just as valid today if not more so. The same issues have frequently arisen of late in the state supreme courts, *Regents of the University of California* v. *Bakke,* 18 Cal.3d 34, 132 Cal. Reptr. 680, 553 P.2d 1152 (1976), and *Lige* v. *Town of Montclair,* New Jersey Supreme Court, November 30, 1976, No. A-107, 45 U.S.L.W. 2295. Both of those decisions struck down mandatory quota systems that disadvantaged non-minorities solely on the basis of race. Indeed, a cursory glance at the cases indicates that in police departments alone the place of quotas in an affirmative action plan has been questioned; *e.g., Lige* v. *Montclair, supra* (disapproving of a quota system); *NAACP* v. *Allen,* 493 F.2d 614 (5th Cir. 1974) (imposing a 25% hiring quota on the Alabama State Police); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973) (restricting use of quotas in promotions). Similar cases in the cities of Chicago and Philadelphia are also in the current news. Nor is the question peculiar to police departments. The appropriateness of quotas is an issue which affects labor unions, employers, employees, potential employees and the public, regardless of whether quotas are instituted voluntarily or pursuant to a court or administrative order.

II. A Controversy As To The Application And Use of Racial Quotas Exists In The Courts And Raises Substantial Federal Questions.

The decision by the Court of Appeals for the Third Circuit conflicts with decisions by this Court, by the Courts of Appeals for the Second and other Circuits

and to the opinions of the highest State Courts of New Jersey and California. The basic issue, as was similarly presented to this Court in *McDonald* v. *Sante Fe Trail Transportation Co.,* —— U.S. ——, 96 S. Ct. 2574 (1976), is whether the Fourteenth Amendment, as well as the Civil Rights Act of 1866, 42 U.S.C. § 1981, affords constitutional protection to whites as well as non-whites. Assuming that, as in *McDonald,* the answer is in the affirmative, the issue that was left untouched by this Court in *McDonald* is then whether benign racial classification—or reverse discrimination—is constitutionally permissible. *Washington* v. *Davis,* —— U.S. ——, 48 L.Ed.2d 597, 96 S. Ct. —— (1976) would at least stand for the proposition that police departments are not constitutionally mandated to have a certain percentage of minorities proportionate to the population. *McDonald, supra,* enunciates that it is error to dismiss a case asserting a violation of civil rights solely on the basis that the plaintiffs are white. The dismissal by the Third Circuit in these cases runs directly contrary to these decisions. As Mr. Justice Douglas noted in his dissent in *DeFunis, supra,* the decision of the Washington Supreme Court upholding a racial quota system was questionable under the holdings of this Court interpreting the Equal Protection Clause of the Fourteenth Amendment.

The Court of Appeals for the Second Circuit has struck down racial quotas used in granting promotions, *Bridgeport Guardians, supra. See also, Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir.), reh. denied, 531 F.2d 5 (2d Cir. 1975), approving the use of racial goals only where the effects on non-minorities are diffused so as to be unrecognizable.

The Third Circuit by dismissing Petitioners' complaints in these cases has prevented Petitioners from litigating the issue of the unconstitutional reverse discrimination procedures promulgated by the Commonwealth, despite the fact that this issue has been recognized as a most troubling one by every court that has considered it. This denies Petitioners due process of law and is in conflict with the Second Circuit.*

The California Supreme Court and the New Jersey Supreme Court have disapproved the use of racial quotas, *Regents of University of California* v. *Bakke, supra,* and *Lige* v. *Town of Montclair, supra.* The *Bakke* Court noted that in deciding if a quota system invaded the majority's constitutionally protected rights, various tests in various circumstances have been applied by federal and state courts without the aid of a clear cut decision of this Court since the war-related cases of 1944. All of the decisions passing on the validity of quotas have to face the issue of what state interests justify deprivation of individual rights. Some racial quota cases apply a "reasonable basis" test under *McGowan* v. *Maryland,* 366 U.S. 420 (1966). Others apply the "compelling state interest" test, *Loving* v. *Virginia,* 388 U.S. 1 (1967). The only clear decision of this Court absolutely permitting curtailment of individual rights on the basis of race grew out of World

* The Second Circuit has recognized, particularly in the context of promotions, that Congress intended to prevent use of quotas as reverse discrimination under Title VII, § 2000e-2(j). *See* E.E.O.C. v. Local 628, 532 F.2d 821, 827 (2d Cir. 1976). Although this action does not arise under Title VII, that act clearly illustrates what Congress saw as the government's "compelling interests" and what are "reasonable and available" ways to overcome discriminatory practices.

War II. *Hirabayashi* v. *U.S.,* 320 U.S. 81 (1943). This Court should now decide when and if the interests of the state are ever great enough (outside of war) to deny an identified citizen the benefit of the Equal Protection Clause. A more substantial Federal question can never exist.

Quota systems have been applied in several different ways. In some cases the plans are voluntary, *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970), *cert. denied,* 402 U.S. 944 (1971); some are administratively or court ordered, *Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.) *cert. denied,* 404 U.S. 854 (1971); some involve sex, *E.E.O.C.* v. *A.T.&T.,* 419 F. Supp. 1022 (E.D. Pa. 1976). The decisions are contradictory even within Circuits; in *Rios* v. *Enterprise Ass'n Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974), the court imposed racial hiring goals, while *Kirkland, supra,* a year later refused to implement permanent quotas. *See also Carter* v. *Gallagher,* 452 F. 2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972), reversing the district court's denial of the imposition of quotas.

The fact is that the "compelling state interest" test alluded to by some decisions to justify a racial quota has never received the sanction of this Court. Although none of the cases involved so patent a violation of the Equal Protection Clause as a racial quota, this Court has consistently ruled that the interest of the State was not sufficient to override a *prima facie* violation of the Equal Protection Clause in analogous situations. *See, McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663

(1966); *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

The "compelling interest" standard has another attribute that is substantially ignored by the imposition of this racial quota. This Court has stated, in *Dunn* v. *Blumstein, supra* at 343, that if there are other reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose a way of greater interference.

III. The Rulings Of The District Court And The Court Of Appeals Deprive Petitioners Of Their Right To Due Process And Materially Undermine This Court's Decision In Hansberry v. Lee, 311 U.S. 32 (1940).

The Court of Appeals for the Third Circuit apparently approved the District Court's dismissal of the Petitioners' claims on the ground that they were an "improper collateral attack" upon the *Bolden* consent decree. The court however, did not specify why the claim was considered an "improper collateral attack."

In *Hansberry* v. *Lee,* 311 U.S. 32 (1940), the same issue was presented, *i.e.,* whether due process allows persons to be bound by a judgment rendered in an earlier litigation in which they were not parties. In *Hansberry,* a group of property owners agreed to impose certain property restrictions on their land. Subsequently litigation arose over the alleged restrictions in which said restrictions were validated. A nonparty to the agreement sold his property and the purchaser contested the validity of the property restriction. The Court held that he was not bound by the previous judgment. The Court stated:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . A judgment rendered in such circumstances is not entitled to full faith and credit which the Constitution and statute of the United States . . . prescribe . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." *Id.* at 40-41 (citations omitted).

See also, Bass v. *Hoagland,* 172 F.2d 205 (5th Cir.), *cert. denied,* 338 U.S. 816 (1949). This principle was reaffirmed in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948):

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment" *Id.* at 16.

Unquestionably, Petitioners were not provided adequate notice of the *Bolden* decision. No formal notice was given. Petitioners had no opportunity to defend in *Bolden* in any respect since they had no idea they would be "bumped" for admission to the Academy or denied a promotion as a result of the racial quota imposed in *Bolden.* In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), this Court reaffirmed the principle that those who never appeared in a prior action could not be collaterally estopped.

> "They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more exist-

ing adjudications of the identical issue which stand squarely against their position . . ." *Id.* at 329.

Eisen v. *Carlisle & Jacquelin,* 417 U.S. 156, 172-177 (1974), also observed that the fundamental requisites of constitutional due process require notice and an opportunity to be heard. *See Katz* v. *Carte Blanche,* 496 F.2d 747, 758-762 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974) ("test case" estoppel). Even if the issue of equal protection had been decided in *Bolden,* Petitioners would not be estopped in this litigation. Indeed Petitioners contend that the issue of "reverse discrimination" was not even raised, and certainly not argued in the meager record, legal briefs and Orders in *Bolden.*

None of the exceptions of *Hansberry, supra,* is present here. In *Hansberry, supra,* the Court explained that if the party's interest was actually represented, he might be bound. 311 U.S. at 42-43. *Compare Katz* v. *Carte Blanche, supra.* For that requirement of estoppel, however, members of the absent parties' class must be actual parties and advocates, to insure full and fair consideration of the common issue. In *Bolden,* no one litigated for Petitioners: in fact, the State stipulated to, and the court agreed to, the denial of Petitioners' right to equal protection by imposing a racial quota system. As the Court said in *Hansberry, supra*:

> "Such a selection of representatives for purposes of litigation whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far". 311 U.S. at 45.

See also *E.E.O.C.* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975). Nowhere is it even suggested that Petitioners were actually represented in the *Bolden* litigation. When the court below attempted to bind Petitioners by that litigation, Petitioners were denied due process of law.

Furthermore, Petitioners are not required to intervene in *Bolden* as suggested by the court below to protect their constitutional right to equal protection. Certainly *Hansberry, supra,* does not require it. *Black and White Children of the Pontiac School System* v. *The School District of Pontiac,* 464 F.2d 1030 (6th Cir. 1972), relied upon by the district court below, is totally inapplicable to the present case. *Pontiac* involved a collateral attack on a decree which ordered integration of schools. Such a decree did not injure the appellants. They were not being denied an education. They were not being excluded from the schools. To make the *Pontiac* case applicable to the present case, the *Pontiac* facts would have had to be something such as "certain students were entitled to be educated but you, the plaintiffs *cannot* go to school at all." Here Petitioners were adversely affected by the *Bolden* case without representation in the proceedings and were denied due process as were plaintiffs in *Hansberry, supra.*

1. Petitioners were not parties to the Bolden case.

According to *Moore's Federal Practice,* Vol. 1B § 0.407 (p. 935) a collateral attack falls under the doctrine of res judicata. But in note 23 the author said:

> "But res judicata will not prevail when third persons, and not parties or privies, are involved".

This Court in the case of *Hansberry* v. *Lee, supra,* held that:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 311 U.S. at 40.

In the case at bar, Petitioners were not designated as parties to the *Bolden* case. They did not know that they would be involved or directly concerned with any issues in this case, nor could they anticipate that they were going to be discriminated against.

2. Petitioners were not in privity with the parties in the Bolden case.

This Court in *Hansberry, supra,* held that:

> "the judgment in a 'class' or representative suit to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." 311 U.S. at 41.

But, according to the Court, the members not actively participating in the suit are bound only if they are *"adequately represented"* and the interests of the members not participating and the members who are parties must be "joint".

> "In such case," the Court said, "we may assume for the present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit." 311 U.S. at 43.

None of the parties in the *Bolden* case had a "mutual interest" with the Petitioners nor were the Petitioners "adequately represented" by any of them. Nor was *Bolden* ever declared a class action.

Bolden was a black policeman and his interests were those of the minorities. He could not represent the Petitioners, who are non-minorities, in a suit in which the interests of minorities and non-minorities were in conflict.

The Pennsylvania State Police was represented by the Commonwealth of Pennsylvania in *Bolden.* The Commonwealth's obligation was not to defend the interests of the non-minorities, and it did not have a "mutual interest" with the Petitioners. Its interest was only in settling the litigation. The Commonwealth entered into stipulations which were not authorized by one of the Commonwealth's officers, Commissioner Barger. In addition, one of the Commonwealth's attorneys admitted he had not prepared for the case, never tried such a case before, and was not prepared to defend. The court below never considered these factual allegations.

Under such circumstances, Petitioners cannot be "privies" of any of the parties in the *Bolden* case nor were the Petitioners' interests adequately represented in *Bolden.*

CONCLUSION

This Court should grant the petition for a writ of certiorari and decide these important civil rights issues.

Respectfully submitted,

WILLIAM S. KIESER
KIESER AND GAHR
N.W. Market Square
Williamsport, Pennsylvania 17701

Attorney for Petitioners

APPENDIX

APPENDIX A

Constitutional Provisions and Statutes Involved.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes Involved

28 U.S.C. § 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2281.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

42 U.S.C. § 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000e-2(j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number, or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 75-619, 75-631

O'BURN et al., *Plaintiffs,*

v.

SHAPP et al., *Defendants.*

LUTZ et al., *Plaintiffs,*

v.

SHAPP et al., *Defendants.*

MEMORANDUM AND ORDER

February 19, 1976

CLIFFORD SCOTT GREEN, *District Judge*

Presently pending before the Court are the defendants' and intervening defendants' motions to dismiss the original and amended complaints and the plaintiffs' response thereto presented at the oral argument on this matter.[1] Also pending before the Court is plaintiff's request for the convening of a three-judge court. The above captioned actions are so-called "reverse discrimination" cases against the

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[1] Plaintiffs opposed the motions to dismiss at the oral argument on this matter, however, the plaintiffs have not provided this Court with a memorandum of law on the issue. Since we do not have a written response from the plaintiffs with the relevant citations to the legal authorities upon which they rely, for the purpose of disposing of the instant motions to dismiss, we considered their memorandum of law previously filed during the preliminary injunction proceedings.

named state officials, filed by several non-minority[2] individuals, who are unsuccessful non-minority applicants for entry into the Pennsylvania State Police and present non-minority members of the State Police; the other plaintiff is an organization, the Conference of State Police Lodges of the Fraternal Order of Police. Plaintiffs allege that the defendants are discriminating against them by hiring and promoting members of minority groups through the use of racial quotas in violation of the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.[3] For the reasons hereinafter stated, we grant the motions to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter and we deny the request for the convening of a three-judge court.

The issues presented in the above-captioned actions arise out of a consent decree entered in a prior action in this Court captioned *Bolden et al.* v. *Pennsylvania State Police et al.*, C.A. 73-2604 (E.D.Pa. June 21, 1974). As noted by the Third Circuit in its prior decision in these actions, "the eligibility criteria currently in effect, and which were in effect when the individual plaintiffs . . . made employment application to the State Police were established as interim standards under . . ." the consent decree entered in *Bolden.*[4] We specifically note that the Oburn plaintiffs have attached a copy of the *Bolden* consent decree to their complaint and

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[2] "Minority" as defined by the *Bolden* consent decree means non-white and Spanish-surnamed individuals.

[3] For a more detailed recitation of the factual background of the above-captioned actions, see this Court's opinion on plaintiffs' request for a preliminary injunction. *Oburn* v. *Shapp,* 393 F.Supp. 561 (E.D.Pa.1975) and the Court of Appeals affirmance of that opinion, *Oburn* v. *Shapp* and *Lutz* v. *Shapp,* 521 F.2d 142 (3d Cir. August 4, 1975).

[4] See note 3, supra.

thereby adopted it by reference as part of their pleading. With respect to the Lutz plaintiffs and their action, we take judicial notice of the prior *Bolden* action, *Burns* v. *Board of School Com'rs of Indianapolis, Inc.*, 302 F.Supp. 309 (S.D.Ind.1969), *aff'd per curiam*, 437 F.2d 1143 (7th Cir. 1971); *Commonwealth of Pennsylvania* v. *Brown*, 373 F.2d (3d Cir. 1967).

The *Bolden* litigation is a suit brought by a Black member of the Pennsylvania State Police to remedy past racial discriminatory employment and promotion policies of the State Police. The parties in *Bolden* drafted a consent decree, subsequently entered as the judgment in the matter, which contained a specific hiring and promotion goal for minorities. Plaintiffs in their complaints allege that the hiring and promotion procedures mandated by the *Bolden* consent decree are the result of an interpretation of a state statute, 71 P.S. § 251.[5] In addition, the Oburn plaintiffs allege, in the alternative, that if the *Bolden* procedures are not an interpretation of 71 P.S. § 251, the effect of the consent decree is to have ruled the statute to be unconstitutional without the convening of a three-judge court in violation of 28 U.S.C. §§ 2281 and 2284. Plaintiffs allege that this Court has jurisdiction over the instant actions under 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Finally, plaintiffs in their prayer for relief seek: (1) a permanent injunction against the use of the hiring and promotion procedures mandated by *Bolden*, (2) a permanent injunction against the implementation of the *Bolden* consent decree and (3) a declaratory judgment that the *Bolden* hiring and promotion procedures are unconstitutional.

[5] Enlisted members of the Pennsylvania State Police are appointed by the Commissioner of the Pennsylvania State Police, see 71 P.S. § 65 (1975 Supp.), after having first satisfied certain criteria set forth in 71 P.S. § 1193 (1962) and the rules and regulations promulgated by the Commissioner set forth in 71 P.S. § 251 (1975 Supp.). More specifically, 71 P.S. § 251(a) provides:

> (a) The Commissioner of Pennsylvania State Police shall be the head and executive officer of the Pennsylvania State Police. He shall provide, for the members of the State Police Force, suitable uniforms, arms, equipment, and, where it is deemed necessary, horses or motor vehicles, and make rules and regulations, subject to the approval of the Governor, prescribing qualifications prerequisite to, or retention of, membership in the force; for the enlistment, training, discipline, and conduct of the members of the force; for the selection and promotion of such members on the basis of merit; for the filing and hearing of charges against such members, and such other rules and regulations as are deemed necessary for the control and regulation of the State Police Force. . . .

The procedural history of the *Bolden*, Oburn and Lutz cases is the following. The *Bolden* suit was adjudicated on June 21, 1974 in this Court in the Eastern District of Pennsylvania. The Oburn case, now pending before us, was filed originally on January 3, 1975, in the United States District Court for the Middle District of Pennsylvania and transferred to this Court pursuant to the defendants' motion on February 28, 1975. The Lutz case, also presently pending before us, was filed originally on March 4, 1975 in the United States District Court for the Middle District of Pennsylvania and transferred to this Court pursuant to the defendants' motion on March 4, 1975.

Defendants move to dismiss the complaints and the amended complaints on the grounds *inter alia* that (1) the instant suits constitute an improper collateral attack on the consent decree approved in *Bolden;* (2) one of the named plaintiffs, the Conference of State Police Lodges of the Fraternal Order of Police, lacks standing to attack the *Bolden* consent decree; and (3) the instant suits have failed to state a claim upon which relief can be granted. Intervening defendants move to dismiss the instant actions on the grounds *inter alia* that (1) the complaint and amended complaint fail to state a claim upon which relief can be granted because of the collateral nature of the proceedings and the failure of the plaintiffs to assert a legally cognizable inter-

est susceptible to judicial protection; (2) the amended complaint alleging fraud fails to state a claim upon which relief can be granted; (3) plaintiff, the Conference of State Police Lodges of the Fraternal Order of Police, and plaintiffs, Clifford P. Artman, Stanley Komosinsky and Matthew Chabel, are barred from prosecuting the Oburn action by the principles of collateral estoppel; and (4) plaintiff, the Conference of State Police Lodges, lacks standing to sue because by prosecuting the Oburn action it has breached its duty of fair representation owed to all its members. At the oral argument plaintiffs opposed defendants' and intervening defendants' motions to dismiss, in essence, on the ground that plaintiffs are strangers to the *Bolden* litigation who have not had, as stated by their counsel, "a meaningful hearing".

While the plaintiffs have continually asserted during the various hearings in these matters that the instant suits are separate and apart from the *Bolden* litigation, their complaints and the relief requested therein reveal with clarity that the instant actions are a collateral attack upon the *Bolden* consent decree. Though plaintiffs originally asserted that the instant actions were grounded upon an attack on a state statute, any doubts as to the validity of this claim were removed with the filing of plaintiffs' amended complaint. The Oburn and Lutz plaintiffs have now amended their complaints by alleging that the *Bolden* consent decree should be set aside as a fraud upon the court. There are a limited number of situations where a collateral attack upon a final judgment is appropriate; accordingly, the issue before us is whether the pending cases come within that category.

In support of their position that a separate action is maintainable, plaintiffs have cited the Court to the case of *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed 22 (1940). However, we find *Hansberry* to be inapposite to the cases before us. *Hansberry* stands for the proposition that

a stranger to a prior suit, who lacks any opportunity to timely contest the validity of the final judgment rendered in that prior suit, may not be bound by the prior judgment, depending on the particular facts, if he would be deprived of the due process of law guaranteed by the Fifth and Fourteenth Amendments.

We cannot accept plaintiffs' position that *Hansberry* allows any third person an unqualified right to collaterally relitigate the merits as a judgment in a prior suit. Under such circumstances, courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute.

If the instant cases presented a situation wherein the plaintiffs had no alternative but to institute an independent lawsuit in order to challenge the *Bolden* consent decree, then their reliance on *Hansberry* might be appropriate. The instant cases do not present such a situation, because this Court continues to maintain jurisdiction over the *Bolden* consent decree. This factor of continuing jurisdiction is quite significant in view of plaintiffs' allegation that the *Bolden* consent decree was procured by a fraud on the court.[6]

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[6] Plaintiffs' theory of fraud is to say the least rather novel. The usual case involving a collateral attack upon a judgment is one brought by an unsuccessful party who alleges that because of some fraud or deception practiced on him by his opponent, there has never been a real contest in the trial or hearing of the case. Plaintiffs' amended complaint, in essence, alleges that the counsel for one of the *Bolden* defendants inadequately and/or fraudulently represented his client. Though this Court continues to retain jurisdiction over the *Bolden* suit, none of the *Bolden* parties themselves have, in the past or the present, raised this issue of inadequate legal representation. Because of our disposition of this matter, it is unnecessary for this Court to reach the merits of plaintiffs' alleged claim of fraud in the procurement of the *Bolden* consent decree.

Further, we find persuasive the defendants' argument that maintenance of the present suits would mean that they may be faced with either inconsistent or contradictory proceedings. It is significant that the parties to the consent decree in *Bolden* do not seek to avoid that decree nor do they question the procedures by which it was procured. Though the Oburn and Lutz suits are now before the same court which has jurisdiction over the *Bolden* suit, it seems inappropriate to subject the state defendants to two lawsuits unless it is absolutely necessary. Here, this Court finds it not to be necessary.

Finally, in this opinion, this Court takes no position on whether plaintiff, the Conference of State Police Lodges, sufficiently participated in the *Bolden* litigation to be collaterally estopped from attacking the consent decree, or whether any of the plaintiffs should hereafter be allowed to intervene in *Bolden*. The Court merely holds that the instant suits are an improper collateral attack upon the *Bolden* consent decree. Other courts in practically identical circumstances to the instant suits have held collateral attacks to be inappropriate and dismissed the actions as we do here. *Black and White Children of Pontiac School System* v. *School District of Pontiac,* 464 F.2d 1030 (6th Cir. 1972); *Construction Industry Combined Committee* v. *International Union of Operating Engineers,* 67 F.R.D. 664 (E.D.Mo.1975).

Though this Court would have subject matter jurisdiction over reverse discrimination cases in general, we do not have jurisdiction over these specific cases, because they are improper collateral attacks upon a consent decree over which this Court continues to exercise jurisdiction. Accordingly, the instant actions are dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The one remaining issue before this Court is plaintiffs' request for the convening of a three-judge court. As we

have previously stated, the instant suits are an attack upon a consent decree, not an attack upon a state statute which would require the convening of a three-judge court. Even if the instant suits were appropriately ones requiring the convening of a three-judge court, a single district judge must rule upon standing and other jurisdictional questions. We have heretofore found this Court lacks subject matter jurisdiction; accordingly, we deny plaintiffs' request for the convening of a three-judge court. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

Order

AND Now, this 19th day of February, 1976, after oral argument and upon consideration of defendants' and intervening defendants' motions to dismiss the original and amended complaints and the plaintiffs' response thereto, for the reasons stated in the attached Memorandum, IT IS ORDERED that said motions are GRANTED. The complaint and amended complaint in the above-captioned actions are dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and the plaintiffs' request for the convening of a three-judge court is DENIED.

/s/ CLIFFORD SCOTT GREEN, J.
Clifford Scott Green, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1439

OBURN, ROBERT PAUL ET AL., FAZENBAKER, PHILLIP D.; SOLOMON, HALL E., JR., ARTMAN, CLIFFORD P.; KOMOSINSKY, STANLEY; CHABAL, MATTHEW, individually and on behalf of all other persons similarly situated and THE CONFERENCE OF STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE, *Appellants*

v.

SHAPP, MILTON ET AL., BARGER, JAMES D.; PACKEL, ISRAEL; MADISON, RICHARD; EARNEST, KLINE; ROSENBERG, RICHARD; individually and in the official capacity
WILLIAM BOLDEN, III, and all minority applicants to and employees of Pa. State Police

(D. C. Civil No. 75-619)

No. 76-1440

DONALD LUTZ and MICHAEL WARFEL, *Appellants*

v.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, EARNEST KLINE, and RICHARD ROSENBERRY, Individually and in their official capacity

(D. C. Civil No. 75-631)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) November 16, 1976

Before BIGGS, VAN DUSEN and ALDISERT, *Circuit Judges*

Judgment Order

After consideration of all contentions raised by appellants and finding the district court properly dismissed the complaints on the basis that these actions constituted improper collateral attacks upon a decree in another case over which the district court maintains jurisdiction, it is

ADJUDGED AND ORDERED that the last sentence of the February 19, 1976, district court order is modified to read "for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure" in place of "for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure," and, as so modified, that order be and is hereby affirmed.

Costs taxed against appellants.

By the Court:

/s/ VAN DUSEN
Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas P. Quinn, *Clerk*

Dated: November 17, 1976

APPENDIX D

71 Pa. Stat. Ann. § 251

(a) The Commissioner of Pennsylvania State Police shall be the head and executive officer of the Pennsylvania State Police. He shall provide, for the members of the State Police Force, suitable uniforms, arms, equipment, and, where it is deemed necessary, horses or motor vehicles, and make rules and regulations, subject to the approval of the Governor, prescribing qualifications prerequisite to, or retention of, membership in the force; for the enlistment, training, discipline, and conduct of the members of the force; for the selection and promotion of such members on the basis of merit; for the filing and hearing of charges against such members, and such other rules and regulations as are deemed necessary for the control and regulation of the State Police Force. The commissioner shall maintain a training school, to be known as the Pennsylvania State Police Academy, for the proper instruction of members of the State Police Force, which shall be situated at such place or places as the commissioner, with the approval of the Governor, may determine. It shall also be the duty of the commissioner to establish local headquarters in various places, so as best to distribute the force through the various sections of the Commonwealth where they will be most efficient in carrying out the purposes of this or any other act to preserve the peace, prevent and detect crime and to police the highways.

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1127

ROBERT PAUL OBURN, PHILIP D. FAZENBAKER, HALL E. SOLOMON, JR., CLIFFORD P. ARTMAN, STANLEY KOMOSINSKY, MATTHEW CHABAL, Individually and on Behalf of All Other Persons Similarly Situated, and THE CONFERENCE OF STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE,

Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ISRAEL PACKEL, RICHARD MADISON, ERNEST KLINE, RICHARD ROSENBERRY, Individually and in Their Official Capacity; WILLIAM BOLDEN, III and ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE,

Respondents,

and

DONALD LUTZ and MICHAEL WARFEL,

Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, ERNEST KLINE, and RICHARD ROSENBERRY, Individually and in Their Official Capacity,

Respondents.

WILLIAM BOLDEN, III and ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE,

Intervening-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR INTERVENING-RESPONDENTS IN OPPOSITION.

ROBERT J. REINSTEIN,
Temple University School of Law,
1715 North Broad Street,
Philadelphia, Pa. 19122

HAROLD I. GOODMAN,
GERMAINE INGRAM,
COMMUNITY LEGAL SERVICES, INC.,
Sylvania House,
Juniper and Locust Streets,
Philadelphia, Pa. 19107

Attorneys for Intervening-Respondents.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1976.

—

No. 76-1127.

—

ROBERT PAUL OBURN, PHILIP D. FAZENBAKER, HALL E. SOLOMON, Jr., CLIFFORD P. ARTMAN, STANLEY KOMOSINSKY, MATTHEW CHABAL, Individually and on Behalf of All Other Persons Similarly Situated, and THE CONFERENCE OF STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE, Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ISRAEL PACKEL, RICHARD MADISON, ERNEST KLINE, RICHARD ROSENBERRY, Individually and in Their Official Capacity; WILLIAM BOLDEN, III AND ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE, Respondents

and

DONALD LUTZ and MICHAEL WARFEL, Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, ERNEST KLINE, AND RICHARD ROSENBERRY, Individually and in Their Official Capacity, Respondents

———

BRIEF FOR INTERVENING-RESPONDENTS IN OPPOSITION.

I. OPINIONS BELOW.

The Opinion of the District Court is reported at 70 F. R. D. 549. The Opinion of the Third Circuit Court of Appeals is not yet reported, but is reproduced in Petitioners' Appendix, 13a-14a.

II. QUESTIONS PRESENTED.

The questions presented by the Petitioners far exceed and misformulate the limited issue which is actually involved in these cases. The only question decided by the District and Circuit Courts, and thus the only question properly raised in this Court, is whether Petitioners' actions were impermissible collateral attacks on a prior judicial decree. Neither Court addressed the question which the Petitioners seek to have this Court resolve, i.e., whether implementation of racial goals required by a prior consent judgment violated any federal right of the non-minority Petitioners. Thus, the issue of "reverse discrimination" is not ripe for adjudication. The only question presented is:

> WHETHER THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINTS ON GROUNDS THAT THEY REPRESENTED IMPROPER COLLATERAL ATTACKS ON A PRIOR COURT JUDGMENT ENTERED IN A CASE OVER WHICH THE DISTRICT COURT CONTINUED TO MAINTAIN JURISDICTION?

III. COUNTER-STATEMENT OF THE CASE.

The *Oburn* and *Lutz* cases represent an overt collateral attack on a prior consent judgment reached in *Bolden, et al. v. Pennsylvania State Police, et al.*, C. A. No. 73-2604 (E. D. Pa.). To place the collateral nature of *Oburn* and *Lutz* in perspective, we briefly describe below the evolution of the *Bolden* litigation.

A. The Bolden Suit.

The *Bolden* suit challenged intentional employment discrimination against minorities by the Pennsylvania State Police and the state officials who were responsible for its employment practices. The racial bias within the Pennsylvania State Police, which had resulted in the virtual exclusion of non-whites from the force, was deepseated and notorious. Not only have there been admissions by the Governor of the Commonwealth, the Lieutenant Governor and the Commissioner of the State Police that a policy of racial discrimination has been practiced by the Pennsylvania State Police since its creation in 1905, but these officials have acknowledged that, although aware of these discriminatory conditions and their duty to remedy them, there was no alteration of the fundamental nature of this illegal and unconstitutional policy*.

B. The Bolden Consent Decree.

On February 12, 1974 the plaintiffs in *Bolden* filed a Motion for a Preliminary Injunction seeking to restrain the defendants from discriminating against minority applicants and employees of the Pennsylvania State Police. Also sought was an affirmative injunction to remedy the effects of past classwide discrimination. The District Court conducted a hearing on that Motion and after nearly three

* These admissions are contained in an extensive Stipulation of Facts entered at the outset of the hearing in *Bolden* on plaintiffs' Motion for a Preliminary Injunction.

weeks of testimony, plaintiffs rested. Almost immediately thereafter, defendants requested and the parties commenced extensive settlement discussions aimed at amicably resolving all class issues raised in the litigation. The result of these negotiations was a comprehensive seventeen (17) page Consent Decree, executed by counsel and approved by the District Court in conformity with Rule 23(e), Fed. R. Civ. P. on June 20, 1974. As expressed in the Decree, the parties' and the District Court's intent was dual-edged: first it was designed to achieve racial integration on and within the Pennsylvania State Police by the hiring and promotion of qualified minorities in the most expeditious manner practicable. Second, it was intended to end the defendants' reliance on invalid (i.e., non-job related) hiring and promotion procedures. To ensure full compliance with the terms and provisions of the Decree, the District Court retained continuing jurisdiction of the litigation.

C. Petitioners' Involvement in the Bolden Consent Decree.

Contrary to Petitioners' assertion, Petitioner, The Conference of State Police Lodges of the Fraternal Order of Police (hereinafter, the F. O. P.) was intensely involved in the *Bolden* lawsuit and the proceedings which culminated in the Consent Decree. In fact, the F. O. P. filed a Motion to Intervene in *Bolden* shortly after the commencement of the hearing on plaintiffs' Motion for a Preliminary Injunction. Before the District Court could rule on intervention, the Attorney General of Pennsylvania appointed the F. O. P.'s counsel as an Assistant Attorney General for the specific purpose of representing the F. O. P.'s interest in the litigation. Thereafter, the F. O. P. was fully represented during the hearing.* After the *Bolden* plaintiffs rested, it

* Not only was the F. O. P.'s interest represented by its own counsel, but also F. O. P. President, Leo Pierce, was present and participated throughout the hearing and the subsequent negotiation discussions.

was the F. O. P.'s counsel who suggested that the parties attempt an amicable resolution of the litigation. He fully participated and was the controlling force in the settlement discussions which followed. That control was further evidenced by his refusal to sign the initial version of the Consent Decree that was submitted to the District Court. Counsel asserted that he was unable to sign at that time because he needed more time to consult with his clients. After consultations, he advised the District Court that he was authorized by the F. O. P. to sign the Decree. As a result, the Decree was approved by the Court, as executed by all parties, on June 20, 1974.* Twelve days later, on July 2nd, counsel for the F. O. P. requested leave of the District Court to withdraw its Motion to Intervene. On July 3, 1974, that Motion was granted.

D. Petitioners' Post Consent Decree Involvement in *Bolden*.

Six months after the execution of the *Bolden* Consent Decree, the F. O. P., and the other Petitioners herein, filed their complaints challenging the constitutionality of the Decree itself.** Yet, even while these separate lawsuits were proceeding, some of the Petitioners sought intervention in *Bolden* to raise a variety of claims. For example, the F. O. P. sought and was granted limited intervention to challenge the procedures used on the promotions which followed the execution of the Consent Decree. Upon Motion, the District Court temporarily enjoined these promotions. After a day-long evidentiary hearing, the

* The full details of the F. O. P.'s involvement are set forth in the Opinion of the District Court denying Petitioners' Motion for a Preliminary Injunction restraining the implementation of the *Bolden* Consent Decree, *Oburn v. Shapp*, 393 F. Supp. 561, at 566-7.

** Petitioners have fully set forth the procedural history of the *Oburn* and *Lutz* cases at pages 10-11 of their Petition and thus we do not repeat it here.

District Court dissolved its temporary injunction, and denied the F. O. P.'s request for a preliminary injunction.

Further indication of the F. O. P.'s utilization of intervention in *Bolden* is that on January 19, 1977, Trooper Gerald Robert Dunn moved to intervene in the *Bolden* action in order to seek reconsideration of an Order entered by the Court on November 29, 1976 modifying the *Bolden* Consent Decree. At the hearing on his Motions, Trooper Dunn testified that he had been requested by his local F. O. P. lodge to seek intervention, that the F. O. P. had provided him an attorney, and that the F. O. P. was paying his counsel fees. Similarly, on January 27, 1977, Trooper Daniel McKnight moved for intervention in the *Bolden* case in order to seek, on his own behalf and on behalf of similarly situated whites, reconsideration of the Court's November 29th Modification Order. He too, was and is, represented by counsel retained by the F. O. P. By means of both the Dunn and McKnight Motions, the F. O. P. sought to raise, with respect to the Modification Order, the very same claim asserted in *Oburn* and *Lutz* with respect to the original Consent Decree, i.e., that the judicial order "reversely discriminated" against non-minorities.

IV. REASONS FOR DENYING THE WRIT.

The District Court's decision, which was affirmed as modified by the Third Circuit Court of Appeals, held the *Oburn* and *Lutz* actions to be impermissible collateral attacks on the *Bolden* Consent Decree. Those decisions are unassailable. Not a single authority cited by Petitioners effectively rejoins the District Court's analysis.

Whatever pretentions the Petitioners may have made to challenging a state statute for purposes of seeking a three-judge court, it is obvious that the focus of Petitioners' attack is the *Bolden* Consent Decree, a consent judgment

reached in prior litigation. As the District Court stated, whatever doubt there may have been regarding the brunt of Petitioners' attack was resolved when the Petitioners explicitly assailed the Consent Decree in their amended complaints. The Petitioners have not alleged, much less proven, that the District Court lacked jurisdiction in *Bolden*. Thus, no tenable argument can be made that the *Oburn* and *Lutz* actions do not collaterally attack a prior judgment.

Whether collateral attacks such as these are maintainable has been address by other courts in almost identical circumstances. In *Black and White Children of Pontiac School System v. School District of Pontiac,* 464 F. 2d 1030 (6th Cir. 1972), where plaintiffs sued to enjoin enforcement of a prior school busing order, the Circuit Court stated:

> Plainly, plaintiffs have mistaken their remedy . . . The District Court has retained jurisdiction of the case. The proper avenue for relief if there were unanticipated problems which had developed in the carrying out of the court's order, was an application to intervene and a motion for additional relief in the principal case. 464 F. 2d at 1030.

A similar result was reached in *Construction Industry Combined Committee v. International Union of Operating Engineers,* 67 F. R. D. 664 (E. D. Mo. 1975). In the instant case, as in *Black and White Children,* the District Court has retained jurisdiction in the action which resulted in the challenged Order. And, as in *Black and White Children,* the avenue for relief is application for intervention and motion for additional relief in the *Bolden* action. Having repeatedly utilized the intervention mechanism

within the context of *Bolden*, the Petitioners can hardly argue the unavailability of this avenue.

The Petitioners' reliance upon *Hansberry v. Lee*, 311 U. S. 32 (1940), is obviously misplaced. First, *Hansberry* dealt with issue preclusion: the plaintiffs had been completely foreclosed by the lower courts from relitigating an issue which had been decided by a prior judgment. Here, the District Court expressly reserved judgment as to whether any of the Petitioners were collaterally estopped or otherwise precluded from litigating any issue. *Oburn v. Shapp, supra*, 393 F. Supp. at 553. Rather, the Court held that whatever issues the Petitioners sought to raise must be presented within the context of the continuing *Bolden* litigation, not through separate lawsuits. Second, the plaintiffs in *Hansberry* had no opportunity to intervene in the prior action, the prior judgment having become final prior to the commencement of their suit. Here, intervention in *Bolden* is not only possible, but it has been utilized by the Petitioners.

Neither *Hansberry* nor any other case cited by Petitioners indicates inconsistency between the District and Circuit Court decisions and the decisions of this Court. Nor do they indicate any rift on the collateral attack issue among the various circuits.

Finally, there is no issue of national importance presented in these cases. Certainly, the determination that these actions are impermissible collateral attacks does not involve ramifications with nation-wide impact. The relative unimportance of the collateral attack issue is not altered by the fact that in bringing these actions the Petitioners sought to adjudicate a "reverse discrimination" claim. The Petitioners may not overcome the fatality of having pursued an improper vehicle for relief by asserting a facially attractive issue on the merits, especially where

the proper vehicle is still accessible. If and when the Petitioners have asserted their "reverse discrimination" claim in the proper procedural context and the lower courts have ruled on their claim, only then will the issue of the propriety under the federal Constitution of the imposition of racial goals pursuant to the *Bolden* Consent Decree be ripe for consideration by this Court.

V. CONCLUSION.

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. REINSTEIN,
Temple University School
of Law,
1715 North Broad Street,
Philadelphia, Pa. 19122

HAROLD I. GOODMAN,
GERMAINE INGRAM,
COMMUNITY LEGAL
SERVICES, INC.,
Sylvania House,
Juniper and Locust Streets,
Philadelphia, Pa. 19107
Attorneys for Intervening-Respondents.